STATE OF MICHIGAN

COURT OF APPEALS

DIMITRIOS ZAVRADINOS,

Plaintiff-Appellee,

v

JTRB, INC., JTR II, L.L.C., RTI, INC., LITTLE DADDY'S OF BLOOMFIELD HILLS, MICHIGAN, L.L.C., RICHARD ROGOW, ATHANASIOS PERISTERIS, and DARREN MCCARTY,

Defendants,

and

ROBERT PROBERT,

Defendant-Appellant,

and

LIZA DANIELLE PROBERT,

Intervening Party-Appellant.

UNPUBLISHED
August 23, 2007

No. 268570
Oakland Circuit Court
LC No. 2004-062158-CK

Before: Fitzgerald, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant Robert Probert and intervening party Liza Danielle Probert appeal from a circuit court order rejecting their objections to plaintiff's garnishment of two brokerage accounts. The trial court determined that the accounts were subject to garnishment because they were owned as joint tenants with rights of survivorship, not as tenants in the entirety, and further, that plaintiff had overcome the presumption that the Proberts owned the accounts equally. We reverse and remand.

There is no dispute that property held by spouses as tenants by the entirety is not subject to garnishment because of MCL 600.6023a, and that the accounts are within the categories of property governed by MCL 557.151. Accordingly, the accounts are considered held in an estate

by the entireties "unless an intent to do otherwise is affirmatively expressed." *DeYoung v Mesler*, 373 Mich 499, 504; 130 NW2d 38 (1964).

The trial court determined that the evidence showed that the Proberts owned the accounts as joint tenants with rights of survivorship, not as tenants by the entirety. To the extent that the Proberts are challenging this determination, it involves an assessment of intent and a finding of fact. This Court reviews a trial court's findings of fact for clear error. MCR 2.613(C).

At the evidentiary hearing, Janet Kemp, a financial consultant for Smith Barney, testified that the accounts were stock accounts and were set up in 2000 and 2001 by the Proberts, as joint tenants with rights of survivorship. Kemp agreed that an individual who wanted to set up an account as tenants by the entirety could have done so. Plaintiff introduced an account application for another account held by the Proberts. On that application, the type of account selected was "JRS Joint (*with rights of survivorship),*" while the box for "ENT Tenants by the Entirety," two lines below, was not selected.[1] Liza Probert testified that she and Robert had been married since 1993. She did not testify regarding the Proberts' intent at the time the accounts were opened.

MCL 557.151 explicitly and unambiguously provides that classes of property named in the statute, which includes stocks and bonds, owned by a husband and wife are owned as tenants by the entirety "unless otherwise therein expressly provided." In interpreting this statute, the Supreme Court in *DeYoung, supra*, held even listing the husband and wife as "joint tenants" is insufficient to create an ordinary joint tenancy rather than as tenants by the entirety. *Id.* at 503. Indeed, the Court suggests that the "only alternative seems to be to use the words 'not as tenants by the entirety' when such is the intent of the conveyance." *Id.* at 503-504.

In the case at bar, there is no such express provision that the Proberts did not hold the stock account as tenants by the entirety. The only evidence that would support such a conclusion is that one form, which references a different account number, has a variety of ways to title an account and the box for a joint tenancy was checked rather than the box for tenants by the entirety. And its unclear whether that form was part of a form signed by the Proberts or whether it was merely filled out by the financial advisor and not actually signed or acknowledged by the Proberts.

Therefore, for plaintiff to prevail, we would have to conclude that a form that may or may not have been signed by the account holders that selects a joint tenancy rather than a tenancy by the entirety for a different account at the same financial institution meets the statutory standard of expressly providing for a form of ownership other than as tenants by the entirety. We cannot make that leap of logic. The possible expression of an intent for one account simply does not expressly provide an intent for a different account. For that matter, we cannot say that it satisfies the requirement of *DeYoung* that the words "not as tenants by the entirety" be used where such is the intent.

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[1] It is unclear to us whether the Proberts signed this form or not. There is no signature on this page, but there are other forms associated with the opening of this account that are signed.

Furthermore, the trial court's reliance on *In re VanConett Estate*, 262 Mich App 660; 687 NW2d 167 (2004), is misplaced. *VanConett* involved property owned by three persons, two of whom were husband and wife. Title to the property conveyed the land to all three "as joint tenants with full rights of survivorship and not as tenants in common." *Id.* at 667. This Court concluded that this was sufficient to prevent a tenancy by the entireties from being created. *Id.* Even assuming that *VanConett* correctly interpreted and applied *DeYoung* to the facts of that case, *VanConett* does not apply here. First, *VanConett* concluded that the requirements of *DeYoung* were met because "explicit language was used," presumably referring to the phrase "and not as tenants in common." *VanConett, supra* at 667. No explicit language of any sort was used in the case at bar. Second, *VanConett* involved property jointly owned by three people, not just by the husband and wife as is the situation in the case at bar.

The trial court concluded that the fact that the Proberts' accounts were created as a joint tenancy with rights of survivorship that that was sufficient to create a joint tenancy rather than a tenancy by the entireties. The trial court's conclusion is erroneous. First, *DeYoung* makes it clear that a conveyance to a husband and wife as joint tenants is insufficient to defeat the presumption in favor of a tenancy by the entirety because a tenancy by the entirety is a form of joint tenancy. *Id.* at 503-504. And if the trial court was drawing a distinction between property titled as "joint tenants" and "joint tenants with rights of survivorship," no such distinction can be drawn. Not only does *DeYoung* not draw such a distinction, but MCL 557.151 itself equates a joint tenancy with full rights of survivorship to the presumption of a tenancy by the entireties when held by a husband and wife. Therefore, this was not sufficient to rebut the presumption of a tenancy by the entireties.

For the above reasons, we conclude that the trial court erred in determining that the presumption in favor of a tenancy by the entirety was defeated. Rather, the trial court should have held that the Proberts held the accounts as tenants by the entirety. Accordingly, on remand, the trial court shall enter a judgment in favor of the Proberts.

In light of our conclusion on this issue, we need not address defendants' argument that the trial court erred in rejecting their argument that Liza is presumed to have contributed half the balance in the funds and only the half attributable to Robert is subject to garnishment. See MCL 487.718.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Defendants may tax costs.

/s/ David H. Sawyer
/s/ Peter D. O'Connell